



Enforcement Alert

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EPA Takes Enforcement Actions Against Violators Who Ditch Wetlands and Channelize Streams

Misapplication of 1998 Court Ruling May Lead to Federal, State Enforcement Actions

The U.S. Environmental Protection Agency (EPA), the U.S. Army Corps of Engineers (Corps), and state agencies are coordinating compliance and enforcement actions to address unauthorized discharges associated with ditching and excavation activities in

wetlands and other waters of the United States.

As a part of this national effort, EPA, in cooperation with the Corps and the North Carolina Department of Environment and Natural Resources, issued administrative orders July 1 to three North Carolina developers, Nelson McRae of Wilmington, and Bill Cameron and Terry Turner of Mallory Creek Development in Pender County, for alleged violations of Sections 404 and 402 of the Clean Water Act (CWA). The orders require the restoration of wetlands and compliance with federal requirements preventing off-site discharges of storm water or other pollutants to waters of the United States.

EPA and North Carolina expect to issue several similar restoration orders in the future.

In light of rapid, large-scale destruction of wetlands, creeks and streams in recent months, EPA has been increasing its enforcement of Section 404 and other CWA requirements in an attempt to stem these losses. Estimates of work from June 1998 to March 1999 indicate that more than 150 miles of rivers, streams and water courses, and nearly 30,000 acres of precious wetlands across the nation have been ditched, drained and/or channelized. EPA is par-

ticularly concerned that an overly broad reading of the D.C. Circuit's 1998 "Tulloch" decision by some developers may have accelerated the destruction of wetlands through illegal discharges.

Where appropriate, EPA will take all actions necessary to ensure compliance with all sections of the CWA. In addition, EPA encourages all entities

About

Enforcement Alert

"Enforcement Alert" is published periodically by the Office of Regulatory Enforcement to inform and educate the public and regulated community of important environmental enforcement issues, recent trends and significant enforcement actions.

This information should help the regulated community anticipate and prevent violations of federal environmental law that could otherwise lead to enforcement action. Reproduction and wide dissemination of this newsletter is encouraged.

See Page 4 for useful EPA Websites and additional resources.

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Ditching, draining and channelization may result in illegal discharges from:

- Mechanized landclearing;
- "Sidecasting" (redeposit of material into wetlands next to a ditch);
- Redepositing material into streams after removal of minerals; and
- Unpermitted stormwater runoff from ditching activities.

involved in activities that may result in discharges to wetlands or other waters of the United States to comply with applicable federal and state regulations.

Clean Water Act, Section 404: Discharges of Dredged or Fill Material

Under the CWA, discharges of dredged or fill material to wetlands and other waters of the United States are generally prohibited except where au-

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thorized by a Section 404 permit issued by the Corps, or by a state approved to administer the permit program. Section 404 and other permit review processes are not aimed at preventing development but instead are designed to avoid unacceptable adverse environmental impacts and, to the extent adverse impacts cannot be avoided, ensure they are appropriately minimized or compensated.

Clean Water Act, Section 402: NPDES Permits for Storm Water and Other Discharges

In addition to applicable Section 404 requirements, any person who discharges or proposes to discharge from a point source must apply for and obtain a permit before discharging. (A point source is a discernable, confined and discrete conveyance from which pollutants are or may be discharged.) Moreover, persons who engage in construction activities (including clearing, grading, and excavation) that disturb five or more acres are required to obtain a National Pollutant Discharge Elimination System (NPDES) Section 402 storm water permit under the Phase I storm water regulations (See 40 C.F.R. 122.26). Amendments to the Clean Water Act established a two-phased approach to addressing storm water discharges. Phase II of the storm water program is under development and will address storm water discharges from certain small municipal separate storm water systems and construction sites. Under the storm water permit-



Recent estimates indicate that more than 150 miles of rivers, streams and water courses and as many as 30,000 acres of invaluable wetlands across the United States have been ditched, drained and/or channelized. (U.S. EPA photograph)

ting program, discharges of storm water generally require “best management practices” to control pollutant runoff. Such activities also may be subject to regulation under other federal and state statutes (for example, the Endangered Species Act), whether or not a discharge results from the activity.

Why is the Protection of Wetlands and Streams Important?

Wetlands are among the most environmentally beneficial habitats in the nation. Wetlands include marshes, swamps, bogs, and similar areas that develop between open water and dry land. Wetlands have specific water regimes and harbor unique soils and plants that provide food and habitat for fish and wildlife. These precious natural re-

sources also provide the public with recreational opportunities and aesthetic pleasures. In addition, wetlands serve many ecological functions such as water purification, erosion control, flood control, and water recharge during droughts and dry weather. The unyielding destruction of wetlands currently occurring may result in increased property flooding for downstream landowners, water quality impairment, loss of wildlife, and negative effects on recreational and commercial fisheries.

Creeks, intermittent streams, and other water bodies are essential to environmental and public health. These waters provide fish breeding, nursery and feeding habitat, water sources for

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wildlife, and storm water channels during flood events. The diverse channel bottom and contours in streams provide oxygen and mineral assimilation into the mixing waters, improving water quality. Excavation and channelization of these systems destroys the value as habitat, and causes increased downstream flooding and severe erosion.

D.C. Circuit's Decision on the 'Tulloch Rule'

Many recent impacts to wetlands have stemmed from an incorrect interpretation by some in the regulated community of the District of Columbia Circuit Court of Appeals' (D.C. Circuit) June 1998 decision in *National Mining Association v. Army Corps of Engineers*, 145 F.3d 1339 (D.C. Cir. 1998) ("NMA"). In *NMA*, the D.C. Circuit affirmed a lower court decision invalidating and setting aside the so-called "Tulloch" rule.

In 1993, the EPA and the Corps published regulations commonly referred to as the "Tulloch" rule. Under the "Tulloch" rule, EPA and the Corps changed the definition of "discharge of dredged material" to include as regulated discharges any redeposit of dredged material, unless a permittee could demonstrate that the activity would not destroy or degrade waters of the United States. The "Tulloch" rule was promulgated to appropriately regulate discharges associated with excavation activities that destroy or degrade waters of the United States.

The D.C. Circuit found that EPA and the Corps, by asserting jurisdiction over "any" redeposit of dredged material, including incidental fallback, had exceeded their statutory authority under the CWA. (The Court described "incidental fallback" as returning dredged

material to virtually the same spot from which it came). The decision did not, however, hold that EPA and the Corps were precluded from regulating all redeposits of dredged material. Rather, the D.C. Circuit acknowledged that some redeposits of dredged material into waters of the United States constitute a discharge of dredged material and therefore require a Section 404 permit. (See

“But we do not hold that the Corps may not legally regulate some forms of redeposit under its Section 404 permitting authority.”— District of Columbia Circuit Court of Appeals' decision in *National Mining Association v. Army Corps of Engineers*, 145 F.3d at 1405.

145 F.3d at 1405 (“But we do not hold that the Corps may not legally regulate some forms of redeposit under its Section 404 permitting authority.”); 145 F.3d at 1405, n.6 (recognizing that “a redeposit could be an addition to [a] new location and thus a discharge”)).

Moreover, the D.C. Circuit in *NMA* recognized, and other courts also have recognized, that redeposits associated with the following are subject to CWA jurisdiction:

- Mechanized landclearing;
- Redeposits at various distances from the point of removal (e.g., sidecasting); and
- Removal of dirt and gravel from a streambed and its subsequent redeposit in the waterway after segregation of minerals. 145 F.3d at 1407.

See also, *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897 (5th Cir. 1983) (mechanized landclearing requires Section 404 permit); *United States v. M.C.C. of Florida*, 772 F.2d 1501 (11th Cir. 1985), vacated on other grounds, 481 U.S. 1034 (1987), readopted in relevant part on remand, 848 F.2d 1133 (11th Cir. 1988) (redeposit of river bottom sediments on adjacent sea grass beds is an “addition”); *Rybachek v. EPA*, 904 F.2d 1276 (9th Cir. 1990) (resuspension of materials by placer miners as part of gold extraction operations is an “addition of a pollutant” under the CWA subject to EPA's regulatory authority); *NMA*, 951 F.Supp. at 270 (“Sidecasting, which involves placing removed soil alongside a ditch, and sloppy disposal practices involving significant discharges into waters, have always been subject to Section 404”).

Federal Government and States: Protecting Wetlands Through Enforcement

Since the *NMA* decision, the Association of State Wetland Managers, Inc., has recently expressed to EPA great concern about mounting losses of wetlands, most notably in the coastal plain of the southeast. These losses have been accelerated by a number of consultants, developers, and land owners who have incorrectly interpreted the *NMA* decision as allowing the ditching or draining of wetlands, even where such activities result in discharges to wetlands or other waters of the United States and require CWA permit authorization.

Many of the sites adversely affected are located near shell-fishing waters and fish nursery grounds. Principal concerns in these areas include increased sedimentation, higher turbidity levels,

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loss of habitat, loss of flood storage, damage to critical estuarine nursery grounds and their associated plant and animal life, and an overall reduction in near-shore water quality.

As reflected by EPA's recent administrative orders issued to the North Carolina developers, entities should be on notice that EPA will take enforcement action for discharges associated with ditching or draining activities that violate applicable CWA Section 402 or Section 404 requirements.

Currently, EPA is investigating a number of sites where ditching and draining activities may have violated federal law. EPA is also considering appropriate strategies to assist the Corps and states in enforcement and restoration efforts. For example, joint interagency field inspections have been conducted in North Carolina's southern counties and will continue throughout the coming months to enforce applicable state and federal regulations. Federal and state agencies have committed to share resources and coordinate enforcement actions to increase regulatory effectiveness. Landowners and contractors who conduct unauthorized activities in waters of the United States may be subject to administra-

tive, civil judicial and/or criminal penalties.

In addition to federal action, several states, like North Carolina, have begun to enact new laws or regulations that regulate all forms of ditching and groundwater pumping, including construction of ponds in wetlands, ditching in isolated wetlands, rim-ditching, maintenance of existing ditches and ditch expansion.

North Carolina's new Wetlands Drainage policy, which the state began enforcing March 1, is not affected by the *NMA* decision. Ditching and draining activities occurring before the effective date of the new rules may still be subject to enforcement action if discharges have occurred that violate federal or other state laws. Other states are considering similar laws and regulations to address recent ditching and excavation activities.

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For information related to enforcement actions in North Carolina, contact Paul Schwartz (404) 562-9576 or Adam Sowatzka (404) 562-9545 in Region IV's Office of Regional Counsel.

Useful Websites

Office of Enforcement and Compliance Assurance:
<http://www.epa.gov/oeca>

Office of Regulatory Enforcement:
<http://www.epa.gov/oeca/ore>

EPA's Audit Policy Website: <http://www.epa.gov/oeca/auditpol.htm>

Office of Wetlands
<http://www.epa.gov/OWOW/wetlands>

EPA's Wetlands Information Hotline:
Website: <http://www.epa.gov/OWOW/wetlands/wetline.html>

Phone Calls: 1-800-832-7828, M-F, excluding Federal Holidays, 9 a.m. to 5:30 p.m. (EST); international callers: (703) 748-1304 or (703) 704-1305

Callers faxing document requests: (703) 703-1308.

E-mail: wetlands-hotline@epamail.epa.gov

EPA's Year 2000 website:
<http://www.epa.gov/year2000>

EPA's Y2K Enforcement Policy:
<http://www.epa.gov/fedrgstr/EPA-GENERAL/1999/March/Day-10/g5958.htm>

EPA's Small Business Gateway:
<http://www.epa.gov/>

